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# In the Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, PETITIONERS

*v.*

AMY ROWLEY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether an individualized education program devised for a particular handicapped child satisfies the requirements of the Education of the Handicapped Act solely by virtue of the fact that it does not conflict with any express provision of the relevant state plan submitted to the Secretary of Education under 20 U.S.C. 1413.

2. Whether the district court properly determined by a preponderance of the evidence that sign-language interpreter services should be included in the "free appropriate public education" to be provided to respondent Amy Rowley under the Education of the Handicapped Act.

3. Whether the district court had jurisdiction to grant injunctive relief extending beyond the school year covered by the individualized education program for which respondents sought judicial review.

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*v.*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### INTEREST OF THE UNITED STATES

This is the first case under the Education of the Handicapped Act, 20 U.S.C. 1401 *et seq.*, to be heard on the merits by this Court. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage.

The United States has a substantial interest in ensuring that federal funds distributed under the Education of the Handicapped Act are administered in a manner consistent with the terms of the Act, and thus has an interest in the questions of federal statutory interpretation involved in this case. In addition, the Department of Justice's litigative interests may be affected by the outcome of this case. First, under 20 U.S.C. (Supp.

III) 1234c(e)(2), the Secretary of Education [1] may refer to the Attorney General for enforcement any final order issued by the Education Appeal Board upon a determination that a recipient of funds under the Act has failed to comply with any of the Act's requirements. Second, under Pub. L. No. 96-247, Section 3, 94 Stat. 350 (to be codified at 42 U.S.C. 1997a(a)), the Attorney General is responsible for ensuring to institutionalized persons the full enjoyment of their rights, privileges and immunities under the Constitution and laws of the United States. To the extent that handicapped children are institutionalized, these rights include rights under the Education of the Handicapped Act.

## STATEMENT

1. The State of New York receives federal funds under Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 *et seq.*[2] As a statutorily-required condition of receiving these funds, New York has agreed to make available a "free appropriate public education" for all school-age handicapped children in the State, and has filed with the Secretary of Education a state plan describing the way in which that obligation will be fulfilled. 20 U.S.C. 1412(1), (2)(B), 1413.

Under the Act, each state, upon appropriate application (20 U.S.C. 1414) and a determination that the statutory eligibility requirements are satisfied (20 U.S.C. 1412), receives a federal grant which is directly proportional to the number of handicapped children, aged 3 to 21, receiving special education in that state (20 U.S.C. 1411(a)(1), (g)). Each state's grant must be allocated

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[1] In Section 301(a)(1) and (a)(2)(H) of the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3441(a)(1) and (a)(2)(H), Congress transferred the administration of the Education of the Handicapped Act from the Commissioner of Education to the Secretary of Education.

[2] We are advised by the Department of Education that all states except New Mexico receive federal funds under this part of the Act.

among its local districts according to the number of such handicapped children in each such district (20 U.S.C. 1411(d)).[3]

At the local level, a public education authority (usually the local school district) must prepare an annual "individualized education program" for each handicapped child within its jurisdiction. 20 U.S.C. 1414(a)(5); see also 20 U.S.C. 1401(8), (22). This program, also known as an IEP, is a written statement describing the specially designed instruction and services that the school district intends to provide to meet the unique needs of the particular handicapped child involved. See 20 U.S.C. 1401(19).

2. Respondent Amy Rowley is a deaf child enrolled at a public school within the Hendrick Hudson Central School District in Westchester County, New York. In December 1978, Amy's parents, also respondents in this Court, challenged the school district's failure to provide for a sign-language interpreter in the IEP prepared for Amy for the academic year 1978-1979, during which she was in the first grade. When the school district's Committee on the Handicapped refused to modify the IEP, the Rowleys sought and obtained administrative review under 20 U.S.C. 1415(b)(2) and (c). The school district's refusal to provide a sign-language interpreter was sustained first by an impartial hearing officer within the school district and then by the petitioner State

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[3] We are advised by the Department of Education that, for the fiscal year ending September 30, 1981, the State of New York received slightly more than $45 million under Part B of the Act, and that the local petitioner received approximately $27,000 for its approximately 145 eligible children. The federal grants are not designed to underwrite the total cost of providing appropriate educational services to handicapped children within each State; rather, the federal funds are intended to supplement state funds earmarked for this purpose. See 20 U.S.C. 1413(a)(9)(B). Neither the evidence in this case nor the records of the Department of Education indicate the average cost per eligible child of complying with the Act.

Commissioner of Education (Pet. App. F-1 to F-25, E-1 to E-6). Respondents then brought this lawsuit in the United States District Court for the Southern District of New York, seeking judicial review of those administrative decisions in accordance with 20 U.S.C. 1415(e)(2). They contended that the school district's failure to provide a sign-language interpreter for Amy denied her the "free appropriate public education" to which she is entitled under the Act.

The district court did not hear evidence in the case until September and October 1979, when the 1979-1980 academic year had already begun and Amy had advanced to the second grade (Pet. App. B-1). At the time of trial, the required IEP had not yet been prepared for Amy for the new academic year (*id.* at D-3). Petitioner, the New York Commissioner of Education, argued that respondents' request for injunctive relief had become moot with the expiration of the 1978-1979 academic year and that the district court lacked jurisdiction to award injunctive relief for 1979-1980 or any subsequent academic year until an IEP had been prepared for that year and available avenues of administrative review had been exhausted. The district court rejected this position on the ground that the alleged inadequacy in Amy's IEP for 1978-1979 was "capable of repetition, yet evading review" and therefore "call[ed] for the invocation of a recognized exception to the mootness doctrine" (*ibid.*). The court concluded that it retained jurisdiction over respondents' challenge to the 1978-1979 IEP and that, under 20 U.S.C. 1415(e)(2), it was "empowered to grant any 'appropriate' relief, * * * which would include injunctive relief extending beyond the school year at issue" (*ibid.*).

Turning to the merits, the district court found (Pet. App. C-2 to C-9) that respondent Amy Rowley is a deaf child with some residual hearing ability. Her residual hearing is particularly good in the lower frequencies, where vowel sounds are distinguished. She is an ex-

cellent lipreader. Amy's parents are also deaf. They have raised Amy through the use of "total communication"—a relatively new system of education for the deaf involving the simultaneous mouthing and signing of words, as well as the use of amplification, touching, and visual cues.

During the 1977-1978 academic year, when Amy was in kindergarten, the school district provided her with an FM wireless hearing aid and, in addition, conducted a two-week experiment with a full-time sign-language interpreter. At the conclusion of this trial period, the interpreter determined that Amy did not need his services for the kindergarten class. For the 1978-1979 academic year, the school district's Committee on the Handicapped recommended that Amy be provided with (a) continued use of the FM wireless hearing aid; (b) tutoring services for one class hour daily; and (c) the services of a speech therapist for three hour-long sessions each week. The Committee decided that Amy did not need the services of a sign-language interpreter.

By all accounts, Amy is a bright, well-adjusted child who interacts well with her classmates and teachers and is successful in her studies. Her achievement test scores are above the class median, and she has an IQ of 122. The district court found (Pet. App. C-7 to C-8, C-20 to C-21 n.6), however, on the basis of auditory speech discrimination tests given under various conditions, that, when Amy uses only her hearing aid and her lipreading ability under conditions most closely approximating the actual classroom setting, she can identify only 59% of the words spoken to her, whereas when she uses the "total communication" method, including a sign-language interpreter, she can identify 100% of the words addressed to her. The court therefore determined (*id.* at C-8 to C-9) that Amy "is not learning as much, or performing as well academically, as she would without her handicap." The court accepted petitioners' evidence that "an interpreter is less necessary for the transmission of mechanical skills in the early grades than for the increasingly academic instruction of higher grades," but it found nevertheless that

"anything missed in the classroom early in the learning process will have far reaching consequences" (*id.* at C-9). Finally, the district court found that "an interpreter could be integrated into the classroom in a way which will not disrupt the class or adversely affect Amy's social interaction" (*ibid.*).

Under the Education of the Handicapped Act, as interpreted by the district court, "each handicapped child [must] be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children" (Pet. App. C-11). Focusing on the testimony of the principal at Amy's school to the effect that "only [Amy's] academic failure would convince the school district that she needed the services of an interpreter" (*id.* at C-12), the court ruled that petitioners applied an incorrect legal standard in determining that the services of a sign-language interpreter were not an essential part of Amy's IEP. The court stated that petitioners improperly ignored "the importance of comparing [Amy's] performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative" (*id.* at C-13). Because of the deficiencies in Amy's understanding as revealed by the speech discrimination tests mentioned above, the court concluded that, without a sign-language interpreter, Amy falls farther short of her educational potential than do her peers.

The court referred to the testimony and affidavits of respondents' experts as additional support for the inferences drawn from the speech test results. The experts stated, largely without contradiction, that "there is a marked trend towards the use of total communication in the education of the deaf—a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication" (Pet. App. C-16). The court commented that, to the extent Amy has managed to make academic progress without the assistance of a sign-language interpreter, her success is attributable in large measure to her superior abilities

and should not be permitted to obscure the critical fact that the IEP designed for her by petitioners provides her with less opportunity to reach her potential than is offered to her non-handicapped classmates. The district court therefore ordered petitioners to provide Amy with the services of a sign-language interpreter "during any school period in which academic subjects are taught" (*id.* at B-1).

3. A divided panel of the court of appeals affirmed in a per curiam opinion (Pet. App. A-1 to A-24). The court ruled that the district court's findings of fact were not clearly erroneous and that its conclusions of law were correct (*id.* at A-5). Accordingly, the court relied primarily on the district court's detailed opinion, stressing in particular its agreement with the finding that "Amy misses a substantial part of what goes on in her classroom" and needs a sign-language interpreter in order to bring her educational opportunity up to the level of the opportunity offered to her non-handicapped classmates (*id.* at A-6). The court concluded by emphasizing that this case is not a class action and that the decision rests completely on evidence concerning "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience" (*id.* at A-7). As a consequence of the court of appeals' affirmance of the district court's order, petitioners provided Amy Rowley with the services of a sign-language interpreter for the 1980-1981 academic year.

Judge Mansfield dissented (Pet. App. A-8 to A-24), expressing the view that the district court's interpretation of "free appropriate public education" was derived improperly from a regulation promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794, and deferred insufficiently to the views of state and local authorities regarding the content of Amy's IEP. In Judge Mansfield's opinion, Congress did not seek, in the Education of the Handicapped Act, to ensure that each handicapped child have the same opportunity to reach his potential as is afforded to non-handicapped children.

Rather, Congress was concerned simply with providing "an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates" (Pet. App. A-19).

## SUMMARY OF ARGUMENT

As a condition of the grant of federal funds under the Education of the Handicapped Act, the State of New York has agreed to make available a "free appropriate public education" to all of its handicapped children. In determining whether respondent Amy Rowley is entitled to the services of a sign-language interpreter as part of the "free appropriate public education" due her under the Act, the district court properly concluded that an "appropriate education" is one which provides the handicapped child with the same opportunity to achieve his or her full potential as is given to his or her non-handicapped peers. The standard articulated by the district court, and adopted by the court of appeals in affirming that court's judgment, is fully consistent with the language and legislative history of the Act and with applicable regulations. Applying that standard to the facts of this case, the district court properly determined, by a preponderance of the evidence (see 20 U.S.C. 1415(e)(2)), that Amy Rowley's individualized education program must include provision for the services of a sign-language interpreter, even though the state plan under which it was prepared does not expressly require such services. Moreover, having made that determination, the district court had jurisdiction to grant injunctive relief extending beyond the school year covered by the IEP for which respondents sought judicial review, since otherwise the deficiencies in the IEP would be "capable of repetition, yet evading review."

## ARGUMENT

### I

### AN INDIVIDUALIZED EDUCATION PROGRAM DEVISED FOR A PARTICULAR HANDICAPPED CHILD DOES NOT SATISFY THE REQUIREMENTS OF THE EDUCATION OF THE HANDICAPPED ACT SOLELY BY VIRTUE OF THE FACT THAT IT DOES NOT CONFLICT WITH ANY EXPRESS PROVISION OF THE RELEVANT STATE PLAN SUBMITTED TO THE SECRETARY OF EDUCATION UNDER 20 U.S.C. 1413

Petitioners contend (Br. 28-52) that the district court should have dismissed respondents' complaint because Amy Rowley's individualized education program conformed with New York's state plan submitted under 20 U.S.C. 1413. Their principal argument in support of this assertion was not presented to the lower courts, but is based on a decision of this Court rendered after the filing of the petition for a writ of certiorari in this case.

Relying on *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), petitioners assert (Br. 31) that the Education of the Handicapped Act "does not create a substantive right to free appropriate public education on behalf of the individual plaintiffs." Petitioners concede that Congress may impose conditions on the disbursement of federal funds (Br. 32), and that the Education of the Handicapped Act does require states receiving funds under the Act to make available a free appropriate public education for all handicapped children as a condition for the receipt of such funds (Br. 33). However, petitioners contend (*ibid.*) that states accepting funds under the Act neither "undertake to provide a particular (i.e., 'appropriate') method or methods of educating handicapped children" nor "consent to a procedure whereby the courts, under the review power of the Act, * * * ultimately direct the states as to what education [is] appropriate, on a case by case basis." Rather, petitioners maintain (Br. 33-36), the Act merely

requires that the state devise a general, state-wide plan for educating its handicapped children and obtain the Secretary of Education's approval of that plan, leaving to the state the decision as to what constitutes an "appropriate" education for each individual handicapped child.

In *Pennhurst*, this Court held that Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. 6000 *et seq.*, creates no enforceable rights and obligations. The Court noted (slip op. 19) that Section 6010 "in no way suggests that the grant of federal funds is 'conditioned' on a state funding the rights described therein," and it further observed that the statute does not authorize withholding of funds for failure to comply with that section. By contrast, the Education of the Handicapped Act specifically conditions a state's eligibility for federal funding on its having undertaken to afford all handicapped children the right to a "free appropriate public education." See 20 U.S.C. 1412(1), 1412(2)(B). Payments to the state may be withheld upon a finding that the state has failed to fulfill this obligation. See 20 U.S.C. 1416(a)(1). In addition, the parent or guardian of a handicapped child may seek to enforce the child's rights under the Act through administrative procedures required to be established by the recipient states under 20 U.S.C. 1415.

Moreover, unlike the Developmentally Disabled Assistance and Bill of Rights Act of 1975, the Education of the Handicapped Act explicitly creates a private right of action whereby the parent or guardian may seek to vindicate the child's rights under the Act in federal court. See 20 U.S.C. 1415(e)(2). Contrary to petitioners' assertion (Br. 51), the scope of administrative and judicial review is not limited to resolution of "questions over procedural regularity, such as procedures to determine correct diagnosis and correct classification as a handicapped child," but rather encompasses "any matter relating to * * * the provision of a free appropriate

public education to [a handicapped] child." 20 U.S.C. 1415(b)(1)(E).

Thus, Congress has made available federal court review of a state's determination as to the "free appropriate public education" to be afforded a particular handicapped child. In accepting federal funds under the Act, the State of New York agreed to abide by the outcome of any such review. The court's review is not limited, as petitioners suggest, to a determination of whether the individualized educational program developed for the child conforms with the state plan; the statute requires more.

Under 20 U.S.C. 1401(18),[4] the "free appropriate public education" to which a handicapped child such as Amy Rowley is entitled consists of special education and related services that meet each of four conditions, none of which is required to be addressed by the state plan. Compare 20 U.S.C. 1412(2) and 1413. Even if the "standards of the State educational agency" referred to in 20 U.S.C. 1401(18)(B) were set out in the state plan, and even if Amy Rowley's education met those standards, neither of which has been established on the record, the services provided to her would not be "appropriate" if they failed to satisfy any of the other requirements of 20 U.S.C. 1401(18). Compliance with the state plan by itself, therefore, is not a sufficient answer to a claim that a school district has failed to provide an appropriate education to a handicapped child. Although a particular state plan may not require school districts

[4] This section provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

to provide sign-language interpreters for their deaf pupils (see Pet. Br. 42), the question remains whether such services are necessary for a particular pupil to satisfy the requirement of "an appropriate preschool, elementary, or secondary school education" (20 U.S.C. 1401(18)(C)) or the requirement that "special education" be "specially designed * * * to meet the unique needs of a handicapped child" (20 U.S.C. 1401(16)). This is precisely the question addressed by the district court, and that court did not err in failing to dismiss the complaint on the basis of petitioners' alleged compliance with the state plan.

The Secretary of Education's approval of New York's state plan under 20 U.S.C. 1413(c) does not establish that a "free appropriate public education" for a particular student need not include the provision of a sign-language interpreter in the classroom. Although the New York plan does not specifically *require* school districts to provide interpreters, neither does it *prohibit* them from doing so (see Pet. Br. 42). The plan simply does not address the question; it leaves to local school districts the initial decision regarding which services are appropriate to the needs of their deaf pupils. The Secretary's approval of the state plan therefore cannot properly be construed as sanctioning the refusal to provide a sign-language interpreter to Amy Rowley or to any other deaf pupil. Nor can the decision below properly be construed as invalidating the state plan.

## II

### THE DISTRICT COURT PROPERLY DETERMINED BY A PREPONDERANCE OF THE EVIDENCE THAT SIGN-LANGUAGE INTERPRETER SERVICES SHOULD BE INCLUDED IN THE "FREE APPROPRIATE PUBLIC EDUCATION" TO BE PROVIDED TO RESPONDENT AMY ROWLEY UNDER THE EDUCATION OF THE HANDICAPPED ACT

The standard adopted by the district court in determining what is a "free appropriate public education" is consistent with the language and legislative history of

the Education of the Handicapped Act and with applicable regulations, and was properly applied to the facts of this case.

Although the Act includes definitions of a "free appropriate public education" and other related terms, the statutory definitions do not adequately explain what is meant by "appropriate." See 20 U.S.C. 1401(18) ("free appropriate public education"); 20 U.S.C. 1401(16) ("special education"); 20 U.S.C. 1401(17) "(related services"); and 20 U.S.C. 1401(19) ("individualized education program").[5] Thus, courts called upon to review the content of an IEP, in accordance with 20 U.S.C. 1415 (e), inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are "appropriate" for the handicapped child involved.

The district court in the present case recognized that for children like Amy Rowley, whose intellectual capacity is unimpaired, an "appropriate" education could mean an "adequate" education (*i.e.*, one that enables a handicapped student to progress from grade to grade and eventually earn a high school diploma) and that it could also mean an education that "enables the handicapped child to achieve his or her full potential" (Pet. App. C-11). The court concluded, however, that the proper standard is one that lies between these two extremes—one that requires that the handicapped child be given the same opportunity to achieve his or her full potential

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[5] 20 U.S.C. 1401(18) is set forth at note 4, *supra*. 20 U.S.C. 1401(16), (17) and (19) are set forth at Pet. App. I-6 to I-7. The difficulty is that the definition of the term "free appropriate public education" contains, *inter alia*, a requirement that such education "include an *appropriate* preschool, elementary, or secondary school education" (20 U.S.C. 1401(18)(C) (emphasis added)), with no further definition of the word "appropriate."

that is given to his or her non-handicapped peers.[6] The court explained (*ibid.*):

> Since some handicapped children will undoubtedly have the [intellectual] ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate" education described above. On the other hand, since even the best public schools lack the resources to

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[6] In explaining this standard, the district court indicated (Pet. App. C-11 to C-12) that it would require the court to determine the extent to which the handicapped child's achievement falls short of his or her potential, and to compare that "shortfall" with the "shortfall" experienced by his or her non-handicapped peers. Petitioners (Br. 67-70) and Judge Mansfield (Pet. App. A-18) interpret this explanation as requiring that the potential and achievement of each non-handicapped child be evaluated and compared with those of each handicapped child. While we agree with petitioners that such a requirement would be unworkable, we do not believe the district court intended to impose such a requirement. Rather, the standard articulated by the court merely requires school districts to compare the educational opportunity offered to handicapped children with the educational opportunity offered to non-handicapped children. This allows for consideration of the deficiencies of a particular school system in evaluating what the school system must provide to its handicapped children. Thus, the issue to be determined in each case is neither relative potential of students nor relative educational achievement. Rather, the individual education plan must provide for substantially equal access to the educational process. For example, if a school system as a whole suffers from a relatively high student-teacher ratio, a determination that a handicapped child in that system could better achieve his or her maximum potential in a less crowded classroom would not of itself require the school system to provide a smaller classroom environment for that child, since all children in that school system are given equal access to the educational program in this respect.

Even if the district court interpreted its own standard as suggested by petitioners and Judge Mansfield, rejection of that interpretation would not require reversal of the court of appeals' decision. For the reasons set forth herein, the standard articulated by the district court—that the handicapped child be given the same opportunity to achieve his or her full potential that is given to his or her non-handicapped peers—is the proper standard under the Education of the Handicapped Act. The court's "shortfall" language is only a gloss on that standard, and may be rejected by this Court while accepting the standard itself.

> enable every child to achieve his full potential, the standard would not require them to go so far.

Accord, *Springdale School District No. 50* v. *Grace*, 656 F.2d 300, 304-305 (8th Cir. 1981); *Espino* v. *Besteiro*, 520 F. Supp. 905, 913 (S.D. Tex. 1981). See also Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1125-1127 (1979).[7] The district court's standard, properly read to require substantially equal access to the educational process, is correct.

The court of appeals correctly concluded that this view has stronger support in the language and legislative history of the Act than the alternative standards advanced by petitioners and by Judge Mansfield in his dissenting

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[7] This case is not like *Battle* v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981), because the court of appeals there found it unnecessary to evaluate the content of an IEP prepared for a particular handicapped student. The court in *Scanlon* reviewed, not an individual decision by a local school district with respect to a single student, but an across-the-board state policy limiting the number of days of instruction that could be provided to any student. Without addressing the specific needs of any individual handicapped child, the Third Circuit ruled that the state's inflexible policy was inconsistent with the Act's emphasis on tailoring each IEP to the "unique needs" of the affected handicapped child.

*Scanlon* is further distinguishable from the present case because the handicapped respondents in *Scanlon* all suffered from severe mental impairments or emotional disturbances and therefore could make only the most limited form of educational progress. Accordingly, whatever the merits of the district court's emphasis in *Scanlon* (see 80-827 Pet. App. 48a) on enabling handicapped students to achieve the maximum possible degree of self-sufficiency and independence from others, that decision is not inconsistent with the district court's conclusion in the present case that the Act seeks to provide handicapped students with an opportunity to fulfill their potential equivalent to the corresponding opportunity available to their non-handicapped classmates.

opinion below.[8] In contrast to their position, the statute speaks of the provision of a "*full* educational opportunity to all handicapped children." 20 U.S.C. 1412(2)(A)(i) (emphasis added); see also, *e.g.*, S. Rep. No. 94-168, 94th Cong., 1st Sess. 3 (1975); 121 Cong. Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.* at 19505 (Sens. Humphrey and Beall); *id.* at 23703-23705 (Rep. Brademas); *id.* at 25538 (Rep. Cornell); *id.* at 37025 (Rep. Perkins); *id.* at 37410 (Sen. Randolph). Indeed, at times it was stated that the Act had the even more far-reaching goal of tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 13, 19 (1975); see also 121 Cong. Rec. 23709 (1975) (remarks of Reps. Biaggi and Minish). Cf. *Kruelle* v. *Biggs*, 489 F. Supp. 169, 173 (D. Del. 1980), aff'd *sub nom. Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981). Of course, as the district court recognized (Pet. App. C-11), Congress did not intend to require "the best possible education that a school could provide if given access to unlimited funds." Note, *supra*, 92 Harv. L. Rev. at 1125. But the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S. Rep. No. 94-168, *supra*, at 9 (emphasis added); see also, *e.g.*, 121 Cong. Rec. 19504 (1975) (remarks of Sen. Humphrey); *id.* at 19505 (Sen. Beall); *id.* at 23704 (Rep. Brademas); *id.* at 25540 (Rep. Grassley); *id.* at 37031 (Rep. Mink); *id.* at 37412 (Sen. Taft); *id.* at 37413 (Sen. Williams); *id.* at 37418-37419 (Sen. Cranston); *id.* at 37419-37420 (Sen. Beall). And this

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[8] Petitioners argue (Br. 66) that the Act was intended merely to enable the handicapped to "become independent, self-sufficient members of society, insofar as their handicapping conditions allow." Judge Mansfield's view is set forth at Pet. App. A-19. See also pages 7-8, *supra*. These standards, although perhaps applicable in determining the appropriate educational program for children whose intellectual capacity is impaired by their handicap, are inconsistent with the legislative emphasis on equality of education (see pages 16-17, *infra*) as applied to children whose intellectual capacity is not so impaired.

means equal opportunity in practice, not just as a matter of theory unrelated to the needs of particular handicapped children. As Senator Stafford, a co-sponsor of the bill in the Senate, remarked, the education provided to handicapped children under the Education of the Handicapped Act "should be equivalent, at least, to the one those children who are not handicapped receive." 121 Cong. Rec. 19483 (1975); see also *id.* at 19494 (Sen. Javits); *id.* at 37030 (Rep. Mink).

In view of the legislative emphasis on equality of opportunity, the court of appeals properly concluded that Congress intended a student like Amy Rowley to be entitled to equal access to the existing educational environment and that, on the facts as found below, the provision of an interpreter was requisite to providing such access. One of Congress' objectives in enacting the statute was to ensure that the talents of handicapped children would not be squandered, but would be developed in the same way as those of their non-handicapped counterparts. This goal appears as applicable to gifted handicapped children as it does to those less intellectually able.

In seeking to determine the meaning of the phrase "free appropriate public education," as it is used in the Education of the Handicapped Act and as applied to Amy Rowley, the district court (Pet. App. C-9 to C-10) also looked to the regulations promulgated under a related statute, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794.[9] These regulations also require the provision of a "free appropriate public education" to the handicapped,[10] defining an "appropriate" education as "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons *as adequately as the*

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[9] HEW's regulations under Section 504, codified in 45 C.F.R. Part 84, have been reissued by the Department of Education and recodified in 34 C.F.R. Part 104.

[10] See 45 C.F.R. 84.33(a), recodified at 34 C.F.R. 104.33(a). The requirement applies to any recipient of federal funds that operates a public elementary or secondary education program.

*needs of nonhandicapped persons are met.*" 45 C.F.R. 84.33(b)(1) (emphasis added), recodified at 34 C.F.R. 104.33(b)(1).[11]

There can be little doubt, given the district court's findings of fact,[12] that its conclusion regarding the adequacy of respondent Amy Rowley's IEP was justified. The court found that Amy is a bright, highly motivated, and energetic child with an IQ of 122, who nevertheless can identify less than 60% of what is said in the classroom.[13] The court further found that, using only her hearing aid and her lipreading ability, Amy "is not learning as much, or performing as well academically, as she would without her handicap" (Pet. App. C-8 to C-9). The court noted that, without an interpreter, much of Amy's energy

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[11] Petitioners do not challenge the district court's consultation of regulations issued under the Rehabilitation Act in the interpretation and application of the Education of the Handicapped Act. In any event, in seeking to determine the meaning of a phrase not fully defined in the Education of the Handicapped Act itself, the court could properly look to sources outside the Act for assistance. Although not dispositive, the interpretation of similar language in regulations promulgated under a related statute was one such source. Consultation of that source was appropriate since the regulations under the Education of the Handicapped Act that were in effect at the time of the district court's decision explicitly required that each annual state plan submitted to the Secretary of Education under 20 U.S.C. 1413 include an assurance that the program would be operated in accordance with the Secretary's Section 504 regulations. See 45 C.F.R. 121a.150 (1979). Current regulations require that state plans meet all statutory and regulatory requirements, and that all states and subgrantees comply with several specified nondiscrimination statutes and their implementing regulations, including Section 504 and 34 C.F.R. Part 104. See 45 C.F.R. 100b.201 and 100b.500, to be recodified at 34 C.F.R. 76.201 and 76.500. See 45 Fed. Reg. 77368 (1980).

[12] See pages 4-6, *supra*.

[13] Although petitioners point to testimony which they deem "convincing evidence that Amy understands all of what is transpiring in her class" (Br. 78), the court of appeals correctly ruled that the district court's factual findings were not clearly erroneous.

must go into compensating for her handicap, whereas the services of an interpreter would enable her to channel her energy into greater academic achievement.[14] The court determined (*id.* at C-14) that it would be "unfair and contrary to law to penalize [Amy] for her own efforts and those of her parents, by which she has remained slightly above the median of her class." Accord, *Espino* v. *Besteiro*, *supra*, 520 F. Supp. at 913. Primarily on the basis of its finding that Amy was not receiving equal access to the existing educational environment, the court concluded that Amy's IEP should include the services of a sign-language interpreter.[15]

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[14] Although Judge Mansfield in his dissenting opinion (Pet. App. A-12) pointed to evidence that, during Amy's two-week trial period with an interpreter in her kindergarten year, she tended to follow the teacher rather than the interpreter, the district court (*id.* at C-17) attributed this tendency both to inadequate coaching as to how to respond to the change in her normal classroom experience and to inadequate time to adjust to the change. The district court also noted (*ibid.*) that the interpreter's determination that his services were not needed was strictly limited to the kindergarten class, and did not rule out the need for interpretation in subsequent academic years.

[15] The district court did not, as petitioners suggest (Br. 18; see also Br. 76, 79-81), hold that "no evidence had been received to determine or compare Amy's shortfall from potential, and it was thus free to order provision of an interpreter for Amy because 'every deaf child hears better in class with an interpreter.'" Rather, the court determined, based on Amy's auditory speech discrimination test results, that she understands 41% less of what is said to her without the services of a sign-language interpreter than she does with an interpreter (Pet. App. C-7 to C-8). Based on this determination, the court concluded that Amy is not performing up to her potential because her handicap and the absence of an interpreter in the classroom deny her equal access to the education provided her non-handicapped classmates (*id.* at C-14 to C-15). The court noted that expert testimony regarding the use of total communication "lent support to the inferences drawn from the word discrimination test results" (*id.* at C-15). In these circumstances, petitioners err in contending (Br. 74-86) that the district court improperly based its decision on expert testimony regarding "the

Petitioners conceded in the court of appeals (see Pet. App. A-5 n.4) that the "special education" and "related services" required by the Education of the Handicapped Act, as defined in 20 U.S.C. 1401(16) and (17) and in regulations promulgated pursuant to the Act, encompass the services of a sign-language interpreter, where appropriate; they contended merely that an interpreter is not "appropriate" and therefore not required in Amy's case. On the other hand, Judge Mansfield suggested in his dissenting opinion that because no specific reference is made to the services of a sign-language interpreter under these provisions, no such services are available under the Act.[16] The term "related services," however, is defined in 20 U.S.C. 1401(17) as "such developmental, corrective, and other supportive services (including * * * audiology * * *) as may be required to assist a handicapped child to benefit from special education." While it is true that 45 C.F.R. 121a.13(b)(1) (to be recodified at 34 C.F.R. 300.13(b)(1), 45 Fed. Reg. 77368 (1980)), in listing related services included within the term "audiology," does not list interpreter services, the comment at-

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superiority of total communication as a tool of education" (Pet. App. C-15), rather than on Amy Rowley's "unique needs."

[16] Judge Mansfield indicated (Pet. App. A-16) that provisions in the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 701 *et seq.*, specifically referring to interpreter services demonstrate that "when Congress wished to provide such services it knew how to do so." See 29 U.S.C. (Supp. III) 774(d) and 777e, providing for grants for the purpose of establishing interpreter training programs and interpreter service programs, respectively. These provisions, however, were enacted following a congressional finding and declaration of a compelling need to provide special supportive services to facilitate the implementation of programs to assist handicapped individuals mandated under both the Education of the Handicapped Act and Section 504 of the Rehabilitation Act. See 29 U.S.C. (Supp. III) 876(a)(1). Congress accordingly directed the Secretary of Labor to establish programs to train personnel to work with and assist handicapped individuals, including the training of "interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. (Supp. III) 876(b).

tached to that regulation emphasizes that "[t]he list of related services is not exhaustive," and that other services are available "if they are required to assist a handicapped child to benefit from special education." In Amy's case, the district court properly determined that, because 41% of Amy's education is not accessible to her without the services of a sign-language interpreter, she is entitled to such services under the Act.[17]

Petitioners suggest (Br. 43-47) for the first time in this litigation that cost considerations may play a part in determining what constitutes an "appropriate" education for a handicapped child, and that the requirement that they provide interpreter services to Amy Rowley would impose an undue financial burden on them.[18] This issue is not properly before the Court. In any event, having accepted funds under the Education of the Handicapped Act, the state is obligated to provide appropriate services for its handicapped children, within the limitations set forth by the Act. The Education of the Handicapped Act is a funding statute whereby federal grants are made available specifically "to assist states in initiating, expanding and improving special education programs."[19] *Gladys J.* v. *Pearland Independent School Dis-*

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[17] Judge Mansfield pointed out in dissent (Pet. App. A-19) that some of Amy's classmates "probably hear substantially less than 100% [too,] due to inattention, daydreaming, and other causes," and the district court recognized that others understand less than 100% due to lack of intellectual potential (*id.* at C-14 to C-15). The district court, however, properly distinguished these causes from Amy's inability to hear or understand what goes on in the classroom, stating (*id.* at C-15) that "Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses."

[18] Petitioners did not make this argument in the courts below, but rather contended only that Amy Rowley does not need the services of an interpreter. They give no support from the record for the cost estimates included in their brief.

[19] Federal funds provided under the Act are intended to supplement state funds, not to cover the entire cost of educating the state's handicapped children. See 20 U.S.C. 1413(a)(9)(B). The

*trict*, 520 F. Supp. 869, 873 (S.D. Tex. 1981). Accord, *Espino* v. *Besteiro*, *supra*, 520 F. Supp. at 910. Thus, the Act is "both a source of funds and a source of obligations." *Gladys J.* v. *Pearland Independent School District*, *supra*, 520 F. Supp. at 873 (footnote omitted). States that are unwilling to take on the obligations imposed by the Act need not accept federal funds under the Act. Recipients of funds under the Act, however, are required, as a condition of receiving those funds,[20] to provide "a comprehensive range of services to accommodate a handicapped child's educational needs, regardless of financial and administrative burdens." *Kruelle* v. *New Castle County School District*, 642 F.2d 687, 695 (3d Cir. 1981) (footnote omitted). Accord, *Gladys J.* v. *Pearland Independent School District*, *supra*, 520 F. Supp. at 879. To the extent that a school system receiving funds under the Act has insufficient funds to finance all of its necessary services and programs, it must still provide its handicapped children with educational opportunities commensurate with the opportunities it provides to its non-handicapped children; the inadequacies of the school system "cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866, 876 (D.D.C. 1972).

Of course, implicit in the notion of an "appropriate" education is some rule of reason, under which enormous expense to obtain minimal results would not be required. For example, if Amy could understand 90% of what goes on in the classroom without the services of an interpreter, as opposed to 95% with such services, her

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legislative history of the Act makes clear that Congress intended the federal funds to pay for part but not all of the cost of educating every handicapped child, and that, as a condition of receiving assistance under the Act, states and school districts would have to bear the balance of the cost. See S. Rep. No. 94-168, *supra*, at 15, 22; H.R. Rep. No. 94-332, *supra*, at 23-24. See also 121 Cong. Rec. 23706 (1975) (remarks of Rep. Perkins).

[20] See pages 2-3, *supra*.

educational program might well be "appropriate" without such services. In the circumstances presented here, however, the accommodation required by the Act in Amy Rowley's case includes providing the services of a sign-language interpreter.[21]

## III

### THE DISTRICT COURT PROPERLY GRANTED INJUNCTIVE RELIEF EXTENDING BEYOND THE SCHOOL YEAR COVERED BY THE INDIVIDUALIZED EDUCATION PROGRAM FOR WHICH RESPONDENTS SOUGHT JUDICIAL REVIEW

Notwithstanding petitioners' contention to the contrary (Br. 87-98), the district court was empowered to grant injunctive relief extending beyond the academic year for which respondents sought judicial review. 20 U.S.C. 1415 (e)(2) provides in pertinent part (emphasis added):

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, *shall grant such relief as the court determines is appropriate.*

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[21] This case differs from *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), in which this Court held that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. III) 794, did not require the petitioner college to accommodate the respondent's hearing disability by substantially modifying its nursing program. While Section 504 forbids the exclusion of an "otherwise qualified handicapped individual" from such a program solely by reason of his or her handicap, that statute does not require a school receiving federal funds to provide services to a handicapped student who is precluded by his or her handicap from fully benefitting from the program. Under the Education of the Handicapped Act, however, an elementary school education program must be made available to all school age handicapped children in a recipient state. Although the Court in *Davis* ruled (442 U.S. at 411) that Section 504 did not impose an "affirmative action obligation" on the petitioner to provide services to the respondent under the circumstances of that case, the Education of the Handicapped Act does contemplate that affirmative steps will be taken to ensure that every handicapped child receives a "free appropriate public education."

The district court correctly ruled (Pet. App. D-2 to D-3) that respondents had exhausted their administrative remedies with respect to Amy's 1978-1979 individualized education program and that, because the deficiencies in the IEP were "capable of repetition, yet evading review," the court retained jurisdiction to grant relief, despite the expiration of that school year. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). The court did *not* hold, as petitioners assert (Br. 19, 90), that it had jurisdiction over Amy's IEP for the 1979-1980 academic year, even though that IEP had not yet been prepared and even though respondents' administrative remedies had not yet been exhausted for that year.[22] Rather, applying its broad remedial authority under Section 1415 (e)(2), the court ordered injunctive relief extending into the 1979-1980 school year on the ground that "Amy needs an interpreter just as much (if not more) in 1979-80 as she did in 1978-79" (Pet. App. D-3).

To hold that such relief is not "appropriate" under the circumstances presented here would render the *Southern Pacific* doctrine meaningless. Since the administrative and judicial processes together take well over nine months to complete, those processes will never be completed during the same academic year for which a chal-

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[22] After this suit was filed, but before the State Commissioner of Education was joined as a defendant, the petitioner school corporation and the respondents stipulated that the district court should review Amy's placement for the 1979-1980 school year (see Pet. App. D-7 n.1). However, following his joinder as a defendant, the petitioner Commissioner challenged the district court's jurisdiction to consider Amy's 1979-1980 IEP, and the court acknowledged (*ibid.*) that "the parties have no power to confer subject matter jurisdiction on the court by agreement." The court did not further address the question of its jurisdiction over Amy's 1979-1980 IEP, in view of its determination that its jurisdiction over the 1978-1979 IEP was sufficient to support the relief granted (*id.* at D-3).

lenged IEP has been prepared.[23] Therefore, unless courts have the power to grant injunctive relief extending beyond that year, a plaintiff would be able to obtain a judicial declaration that a feature of his previous IEP violated the Act, but he would be unable to correct the problem prospectively. The error could be repeated and could still evade any review that could result in meaningful relief for the handicapped student.

Moreover, although the district court did not address the question, it in fact did have jurisdiction over Amy's 1979-1980 IEP, despite the lack of exhaustion as to that program. Failure to exhaust administrative remedies under the Act does not bar suit "when resorting to state procedures clearly would be futile." *Armstrong* v. *Kline*, 476 F. Supp. 583, 602 (E.D. Pa. 1979), remanded on other grounds *sub nom. Battle* v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied *sub nom. Scanlon* v. *Battle*, No. 80-827 (June 22, 1981). Accord, *Harris* v. *Campbell*, 472 F. Supp. 51, 54 (E.D. Va. 1979); *Loughran* v. *Flanders*, 470 F. Supp. 110, 112 (D. Conn. 1979).[24] Because the school district's refusal to provide for a sign-language interpreter as part of Amy's 1978-1979 IEP was sustained throughout the administrative review of that program, and because the school district continued to maintain in the district court that no interpreter serv-

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[23] Petitioners contend (Br. 96-97) that, but for several months of delay occasioned by the respondents, this case could have been heard by the district court in early 1979 rather than in August of that year. The district court's decision, however, was not rendered until five months after the case was heard, was subject to further review by the court of appeals, and is still awaiting this Court's review two years after it was rendered.

[24] The legislative history of the Act demonstrates that this result was contemplated by Congress. See 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams):

> [E]xhaustion of the administrative procedures established under [the Act] should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter. * * *

ices would be necessary in the absence of academic failure by Amy (Pet. App. C-12), exhaustion of administrative remedies with respect to the 1979-1980 program would have been futile.[25] The district court therefore had jurisdiction over that IEP without the necessity of additional state procedures.[26]

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[25] If injunctive relief extending beyond the school year were deemed not "appropriate" within the meaning of 20 U.S.C. 1415(e)(2), exhaustion would also be futile in that it would preclude consideration by the courts at a time when they could render meaningful relief.

[26] Petitioners also contend (Br. 99-105) that the court of appeals erred in limiting the precedential effect of its decision pursuant to Rule 0.23 of its local rules. While we agree that Rule 0.23 was inapplicable in this case because the court's decision was not unanimous and was not rendered from the bench or by summary order, this alleged error has no effect on the substantive merits of the court's decision and accordingly does not constitute grounds for reversal. We believe the court's limitation of its decision was intended merely to preclude citation of its decision that Amy Rowley is entitled to a sign-language interpreter as authority for the proposition that all deaf children are entitled to such services. This limitation, like the court's decision, was entirely proper.

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